IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 445

In the Matter
of the
Petition of LAKE TANKERS CORPORATION,
Petitioner,
for exoneration from or limitation of liability.
LILLIAN M. HENN, Administratrix,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Opinions Below.

The opinion of the Court of Appeals is reported at 232 F. 2d 573 and is printed in the appendix to the petition at page 15, *et seq.* and at page 91a of the record. The Court's *per curiam* opinion granting the petition for rehearing *in banc* and adhering to its original decision, not yet reported, is printed in the appendix to the petition at page 30, and at page 173a of the record. The opinion of WEINFELD, J., in the District Court, from which the appeal was taken to the Court of Appeals, is reported at 137 F. Supp. 311, and it and the order entered thereupon are printed at pages 57a-63a of the record. His first opinion

is reported at 132 F. Supp. 504 and printed at page 35a of the record. The opinion of RYAN, J., is reported only at 1955 A. M. C. 55, but is printed at page 26a of the record.

Question Presented.

Respondent takes issue with the propriety and accuracy of the question presented by the petition. It will be shown hereinafter that the phrase "the aggregate of which is greater than the amount of its limitation fund" does not express the true circumstances of the case as required by Rule 23 (c) and is ground alone for denial of the petition, Rule 23, sub. 4. A review by this Court would necessarily turn upon an analysis of the facts, with petitioner's version at complete variance with the circumstances described in the Lower Courts' opinions.

Further, the writ is sought at an interlocutory rather than a final stage of the proceeding. The petition merely involves an order of the District Court modifying its own restraining order to permit the respondent, one of eleven claimants, to exercise her common law right to a jury trial subject to the preservation in the District Court of petitioner's right of limitation. No unusual factor is presented to justify a review by this Court.

Statement.

The inaccuracy in the question presented by the petition lies in the use of the word "aggregate" in reference to the claims and in relation to what petitioner calls "the amount of its limitation fund". The statement in the petition requires correction where it employs words indicating that the respondent "apportioned" or "allocated" her claim between the tug and barge for she did no such thing, either at the suggestion of the District Court, as stated at page 4 of the petition, or at her own instance, nor did the petitioner contend in the District Court that there was a single limitation fund. The statement of the holding of

WEINFELD, J., denying respondent's motion to vacate the restraining order upon the first hearing, is also erroneously summarized in the petition at page 4.

The Court at that time stated the petitioner's position (132 Fed. Supp. 504, 505):

> "The petitioner contends that Petition of Texas Co., supra, is inapplicable; that in fact the limitation funds do not exceed the aggregate of all claims filed against it. *It urges that in the instance proceeding there is not a single limitation fund of $283,542.21 but on the contrary two separate funds, one for the Eastern Cities in the sum of $118,542.21 and the other for the LTC No. 38 in the amount of $165,000, and that pending a final determination of liability on the part of each vessel, each fund must be treated separately* and so treated clearly the eleven claims exceed each fund and so must be brought into concourse." (Italics ours.)

Regarding each vessel as a separate entity, for which a separate stipulation had been required in substitution for the vessel, the Court then denied the motion to modify "but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond" (at p. 507).

Upon appeal from the order of modification, petitioner reversed its position and then contended that there was but one fund composed of two bonds and, accordingly, that Judge WEINFELD fell into error when he concluded that inasmuch as there were two vessels and two bonds there were two funds. The majority of the Court of Appeals rejected petitioner's disaffirmance of the position which it originally had taken, and which was the conclusion reached by Judge WEINFELD. It held that there are in truth two funds, separately established by petitioner as owner of each vessel, represented by two bonds, to which by their very terms, claimant is relegated for her recovery

against each, if liability is found against the petitioner as owner of either or both of the vessels. It should also be kept in mind that the problem which petitioner propounded in the District Court and the Court of Appeals arose from the fact that petitioner wrongfully filed a bond only on behalf of the tug, despite its knowledge that claimant, in her State Court suit, had charged negligence against the petitioner as owner of the barge as well as the tug. As Judge RYAN noted, upon the first hearing of the matter, a factual issue was presented for trial with respect to negligence of the barge personnel in the inadequacy of its lights, as well as to the tug's navigational errors (1955 A. M. C. 55, 56, not otherwise reported).

In support of respondent's assertion that there is inaccuracy in the use of the term "aggregate" in the question presented by the petition, as well as the use of similar expressions such as "apportion" and "allocated" in relation to the amount of the respondent's claim against petitioner as owner of each vessel, attention is respectfully directed to the opinion of WEINFELD, J., upon the second hearing when he modified the restraining order (137 Fed. Supp. 311, 312). The Court there pointed out that the bond on behalf of the tug was in the sum of $118,542.21 while the claims asserted against it, under the stipulations filed by the claimants, were limited to $109,525, that the bond filed on behalf of the barge was in the sum of $165,000, while the claims asserted against it under the stipulations filed by claimants were limited to $159,525, and further that claimants had stipulated that their claims would never be increased, that judgments in excess of the stipulated amounts would not be entered in any Court and that any claim of *res judicata* relative to the issue of limited liability, based upon a judgment in any other Court, was waived. The Court then said (at p. 312):

> "Nonetheless the petitioner contends that the motion to vacate the restraining order must again be denied

> because the amount of the administratrix' claim has not been reduced—'it has only been allocated as between tug and barge' and the aggregate of the claims remain as before. I cannot agree. The claimant has in fact reduced her claim as against each vessel. She will be entitled to the aggregate of her separate and reduced claims only if she succeeds in fastening liability by reason of the negligent operation of both the tug and the barge. As I stated in my earlier opinion: '* * * While it is true liability is charged against the barge * * * as well as the tug, it may eventuate that only the tug will be found liable, in which event the bond posted for the barge could not be availed of.' There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel."

The Court of Appeals adopted Judge WEINFELD's statement of the situation, including his conclusion that:

> "Since petitioner as ship owner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the State Court—the forum of her choice" (232 F. 2d 573, 576).

It affirmed on the basis that there were in effect two separate limitation proceedings, stating at page 577:

> "Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to $109,525, an amount less than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all the claims against peti-

> tioner as the barge's owner come to $159,525, an amount less than the bond of $165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge."

Aside from the stipulations filed by other claimants as referred to above, this respondent carefully complied, by written stipulation, with express conditions and gave petitioner unconditional partial releases, duly verified before a notary public, all in accordance with a prior decision of the Court of Appeals for the Second Circuit in *Petition of Trinidad Corporation*, 229 F. 2d 423 and the order of Judge WEINFELD entered upon such stipulation. These are set forth in the opinion of the Court of Appeals at 232 F. 2d 577-579.

From the foregoing it will be preceived that there are glaring factual inaccuracies in the statement, as well as in the Question Presented in the petition. The respondent did not "apportion" or file a stipulation "purporting to allocate" her claim as between the tug and barge, either at the Court's suggestion or otherwise. As the Court of Appeals and District Court have pointed out she clearly *reduced* her claims against petitioner with respect to each of its vessels though it happens mathematically that they total $250,000. Of course, if she had reduced her claim against the barge to $120,000 and had given a partial release for the difference between that amount and her original claim, petitioner would not have had this weak mathematical reed to lean upon.

It is deemed important to make the reference, at this point in the brief, because it is not a question of law but a question of fact, which has been distorted both in petitioner's argument in the Lower Courts and in the petition before this Court. Petitioner seeks to have this busy Court analyze the circumstances again to reach a finding different

from that determined in the Courts below. It is therefore submitted that by reason of the inaccuracies and the burden which is sought to be imposed upon the Court the application is a frivolous one.

Argument.

I. The Court of Appeals did not construe the statute contrary to the rules established by this Court.

The gist of the petitioner's argument, based upon an erroneous statement of the circumstances of the case, is that the Court of Appeals did not construe the statute liberally for the benefit of the ship owner. However, there is the equally forceful principle that since the statute is in derogation of the common law and abridges the rights of claimant to a full recovery of her damages, it is not to be construed to interfere with her rights to a greater extent than is necessary to fully and adequately effectuate the purpose of the Act. *Petition of Southern Steamship Company,* 132 Fed. Supp. 316, 319 (D. E. Del.). This Court, in *Langes* v. *Green,* 282 U. S. 531, pointed out that it is within the discretion of the District Judge whether the restraint should be lifted and that such discretion should be exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. The Court of Appeals for the Second Circuit, in *Petition of Trinidad* (*supra*), page 428, recognized that such discretion was with the District Judge, in his consideration of all of the circumstances. Having had the matter twice before him and with complete knowledge of all circumstances Judge WEINFELD, in a careful opinion, concluded: "Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be per-

mitted to proceed with her action in the State Court—the forum of her choice" (137 F. Supp. 313).

Of course, petitioner could have instituted one proceeding to limit its liability as owner of the tug and another to limit its liability to the value of the barge. It cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings (*In re: Petition of Lake Tankers Corporation, supra,* 576, 577). In fact, petitioner had urged in the District Court that it could have instituted separate proceedings and if, after Judge RYAN's decision requiring a posting of the bond for the barge, it had done so as barge owner, claimant would have filed a claim in each proceeding, the fund in each would have been adequate and she, long since, would have had her common law trial to recover, on behalf of herself and her three minor children, for the death of her husband. Apparently petitioner contends that it alone could determine whether she might have such trial in the law forum, that the choice depends upon petitioner's whim in the filing of a single or two proceedings. If such argument prevails it would follow that where a petition in limitation names two or more vessels, whose personnel are separately charged with fault, no relief whatever could be afforded by the Courts to save to claimant-suitors their common law remedy. The Courts would then be powerless to lift the restraint though claims are separately asserted against separate adequate funds. This course would be wholly opposed to this Court's holding in *Langes* v. *Green* (*supra*) where emphasis was laid upon the principles that the common law right to a jury trial must be preserved, just as the right of the shipowner to the benefits of the limitation statutes are to be preserved in the admiralty; that the act which gives the Court admiralty jurisdiction saves to suitors in all cases the right of the common law remedy where the common law is competent to give it, and good faith requires that this provision shall have its full force and effect. It was further

recognized that if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of the admiralty court is to escape a jury trial and take the case away from the common law jurisdiction that purpose should receive no countenance.

II. There is no case for a *concursus* here.

Under similar circumstances, where by stipulation, the claimants had reduced their claims, agreed never to increase them and waived any claim of *res judicata* relevant to the issue of limited liability, the Court of Appeals for the Second Circuit in *Petition of Texas Co.*, 213 F. 2d 479 modified the injunction in a limitation to permit claimants to proceed to trial in the forum of their choice. In that case, where the argument with respect to a *concursus* was thoroughly exhausted, and the matter brought to this Court upon a petition for a writ of certiorari, the petition was denied (348 U. S. 829, 99 L. Ed. 653).

At page 9 of the petition it is suggested that the other claimants will ask and obtain leave to proceed with their actions at law also. The Court of Appeals for the Second Circuit has already resolved that question (232 F. 2d subnote p. 577):

> "Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably as we said in *Trinidad;* and the limitation proceeding was instituted a year and four months ago."

At pages 9 and 10 petitioner erroneously urges again that the claims "aggregate" $259,000 and makes unnecessary refefence to the amounts of claims in pending State Court actions (since all claims have been fixed by stipula-

tion). It also states that its limitation fund would not exceed the value of the tug, $118,500 "unless somehow the barge, without motive power and wholly under the control of the tug, is also held at fault". It is not seen how petitioner may assume to judge the unliklihood of its being held for the negligence of those on its barge any more than for the negligence of those on its tug. It is settled law that the right to limit is in substance always a plea in confession and avoidance, either partial or total, according to the existence or absence of salvage and freight, that for this reason the owner may plead it as a defense to the claimant's action if he pleases and that when he proceeds by petition, he does not change his legal position on the main issues. Further, the fault of the vessel (in this case the barge as well as the tug) is to be taken for granted on the question of limitation.

Southern Pacific Co. v. *United States,* 72 F. 2d 212, 214 (C. A. 2);
Petition of United States, 178 F. 2d 243, 252 (C. A. 2).

The petitioner also urges that here there is a reasonable apprehension that the multiple claims will exceed its interest in each of the vessels, but this is premised upon the repeated misstatement of fact that there was an "allocation" of respondent's claim, which coupled with the reduction of all claims, petitioner says, would deprive the admiralty court of jurisdiction. That argument again is completely contradictory of the decisions of the two Lower Courts and the stipulation filed in support of the appealed order (232 F. 2d, pp. 573, 577, 137 F. Supp., p. 313; appendix to petition, pp. 20, 22, 25, record, pp. 61a, 63a).

III. There is no delegation to the State Court of the determination of a vessel's liability *in rem* as suggested by petitioner.

By general statements of law, the supporting authorities, and by suppositious problems which it poses, the petitioner seeks to convey the notion that by some quirk of procedure the State Court would invade the sole province of the Admiralty Court to determine the *in rem* liability of a vessel.

The Court of Appeals in this case (*supra*) wrote at page 577:

> "As Judge WEINFELD said, a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty jurisdiction of the court below affecting the limitation of liability: (a) No judgment of the state court can operate *in rem:* (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel."

Judge WEINFELD had pointed out that "a special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the State Court will deny an appropriate application for a special verdict" (137 F. Supp., p. 313).

The New York Civil Practice Act, Sections 458 and 459 make clear provision for instructions to the jury on a special verdict by questions and findings in writing, and which must be filed with the Clerk and entered in the minutes, upon which a judgment is issued. The New York

State reporters are replete with cases where those sections have been employed successfully and the appellate courts have encouraged the practice for the very purpose of lightening their work. This case is a prime example of one where the special verdict would be of particular value. Further, why should there be confusion or difficulty in this respect, upon a trial before a jury, any more than before a District Judge who is charged under this Court's Admiralty Rule 46½ to make specific findings of fact? The determination by the jury of liability of petitioner for the negligence of the personnel of either or both vessels and the amount of respondent's damages are wholly apart from the sole and exclusive jurisdiction of the Admiralty Court over the limitation proceedings. Thus the rights of both parties will be amply protected and the rule of *Langes* v. *Green* (*supra*) will be complied with.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 22, 1956.